IN THE

Supreme Court of the United States

October Term, 1975
No. 75-1642

ARTHUR J. ABRAMS,

Petitioner,

vs.

THE COMMUNITY REDEVELOPMENT AGENCY OF THE CITY OF LOS ANGELES,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

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SUBJECT INDEX

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I

The Economic Expectancy Known as Business Goodwill Does Not Ipso Facto Become Compensable Under the Fourteenth Amendment to the United States Constitution Simply Because the State of California Defines That Expectancy as "Property" for Specified Purposes, but Not as a Compensable Item When Incidentally or Consequentially Lost When Real Property Is Acquired Through the Exercise of the Power of Eminent Domain.

The principal thrust of Petitioner's argument rests upon the erroneous premise that if State law defines an economic expectancy, in this case business goodwill, as "property" for specified purposes (*e.g. California Business and Professions Code* §14102) ". . . that confers upon that right the status of 'property'

in a *constitutional sense*." (Petition, p. 15.) Petitioner relies upon *United States v. Willow River Power Co.* (1945), 324 U.S. 499, 502-503.

The fallacy in this argument is that the incidental or consequential loss of business goodwill has never at any time applicable to the case at bench been recognized in the State of California as compensable "property" in the constitutional sense when real property upon which a business is conducted is acquired for public purposes under the power of eminent domain.

Sixty years ago the Supreme Court of California speaking to this issue in *Oakland v. Pacific Coast Lumber, etc. Co.* (1915), 171 Cal. 392, 398, stated:

> ". . . [T]he real contention of appellant . . . [is] that business is property, and when the taking by the state or its agencies interferes with, impairs, damages, or destroys a business, compensation may be recovered therefor. We are not to be understood as saying that this should not be the law when we do say that it is not our law. It is quite within the power of the legislature to declare that a damage to that form of property known as business or the goodwill of a business shall be compensated for, but unless the constitution or the legislature has so declared, it is the universal rule of construction that an injury or an inconvenience to a business is *damnum absque injuria*, and does not form an element of the compensating damages to be awarded." *Oakland v. Pacific Coast Lumber, etc. Co.* (1915), 171 Cal. 392, 398.[1]

[1]In 1975, the California Legislature adopted and the Governor signed into law a comprehensive Eminent Domain Law which, under limited circumstances, provides for the compensation for goodwill lost as the incident to the acquisition of real property upon which a business is conducted. This new law does not become operative until July 1, 1976 and is not, therefore, applicable to the case at bench. (California Statutes 1975, ch. 1275, p. ....., Section 2, operative July 1, 1976.)

This rule was reaffirmed in the instant opinion as to which petitioner seeks review, and generally speaking, is the rule which applies in all other jurisdictions. See 4 Nichols, *Eminent Domain* (3d ed. 1974), Section 13.3, pages 13-148.2-13.165; 1 Orgel, *Valuation Under The Law of Eminent Domain* (2d ed. 1953), Sections 1, 66-77, pages 1-11, 303-334.

Petitioner perpetuates this fallacious argument by contending that if an economic interest is declared "property" for all purposes, it is illogical and "semantic legerdemain" to deny compensation for the loss of impairment thereof in the exercise of eminent domain. (Petition at pp. 16-17.) Apart from pointing out that goodwill is defined as "property" for specified purposes and that it may be the subject of taxation under California law, Petitioner wholly fails to establish that goodwill is considered "property" for *all purposes*. Petitioner's contention simply begs the question.

The foregoing contention was definitively answered by this Court, speaking through Justice Douglas for the majority in *United States ex rel. T.V.A. v. Powelson* (1943), 319 U.S. 266, as follows:

> ". . . There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment. The point is well illustrated by two other lines of cases in this field. It is a well settled rule that while it is the owner's loss, not the taker's gain, which is the measure of compensation for

the property taken (citations omitted), *not all losses suffered by the owner are compensable under the Fifth Amendment*. In absence of a statutory mandate . . . the sovereign must pay only for what it takes, not for opportunities which the owner may lose. See Orgel, *Valuation Under Eminent Domain* (1936), §71, §73. . . . That which is not 'private property' within the meaning of the Fifth Amendment likewise may be a thing of value which is destroyed or impaired by the taking of lands by the United States. But like the business destroyed but not taken in the *Mitchell* case it need not be reflected in the award due the landowner unless Congress so provides." (319 U.S. at 281-283; Emphasis added.)

California law, in accord with the United States Supreme Court decision in *Powelson,* does not find that all "property interests" are compensable in eminent domain and that property for taxation purposes is entirely different from interests which are compensable in eminent domain. In *Placer County Water Agency v. Jonas,* 275 Cal. App. 2d 691, the Court stated at page 698:

"The fact that title 18 of the Administrative Code, section 126, classifies for purpose of state tax assessment certain grazing rights on publicly owned land as 'a taxable possessory interest' is of no consequence in solving the problem before us. The concept of 'property interests' for taxation purposes is entirely different from that of compensable interests in eminent domain.

In *San Pedro etc. R.R. Co. v. Los Angeles* (1919) 180 Cal. 18, 23 [179 P. 393], the court

pointed out that '"[t]he principle that a possessory right in public land is private property, and that it may be assessed for purposes of taxation to the person in possession, although in point of law he may have no right against the state or government owning the land, has long been settled in this state. [Citations.] . . ."' The opinion further states that 'a bare possession by the sufferance of the real owner is subject to taxation where the estate of the real owner is exempt because the state or the United States is such real owner. . . .' (P. 25.)

While Jonas' interest in the public lands, such as it is, may be subject to taxation by the state, the authorities hereinbefore set forth conclusively establish that in an eminent domain proceeding such interest is not compensable. (See also *People* ex rel. *Dept. Public Works v. DiTomaso* (1967) 248 Cal.App.2d 741, 750-751 [57 Cal.Rptr. 293], citing with approval the determination in *People* ex rel. *Dept. Pub. Works v. Lundy, supra,* 238 Cal.App.2d at p. 358, that '"[l]icenses . . . are not proper subjects of condemnation."')"

II

The State of California Does Not Tax Business Goodwill Per Se.

The State of California does not now have nor has it ever had a property tax on business goodwill *per se*. Petitioner herein has never paid such a tax on the goodwill of his pharmacy business.

The California decisions cited by petitioner on page 18, footnote 10, of the petition for the proposition

that business goodwill is fully taxable as "property" *did not* involve goodwill. *Bank of California v. San Francisco* (1904), 142 Cal. 276, 75 Pac. 832 and *Miller and Lux v. Richardson* (1920), 182 Cal. 115, 187 Pac. 411, were primarily concerned with ad valorem taxation of *corporate franchises.* (Corporate franchises are taxable under Article XIII, Section 27 (formerly Article XIII, Section 16).) Petitioner cites no California decision involving the taxation of goodwill *per se,* under *Cal. Rev. and Tax. Code* §201.[2]

Business goodwill is clearly an intangible property interest, and as to such intangibles the California Supreme Court in *Roehm v. County of Orange* (1948), 32 Cal. 2d 280, 196 P. 2d 550, declared that as such it is not taxable. *Roehm* involved the Orange County Assessor's attempt to tax a liquor license, and the owner of the liquor license claimed that it, along with other intangibles such as "the goodwill of businesses", are not taxable. The California Supreme Court agreed that under Article XIII, Section 1, and all other constitutional statutory provisions, such intangibles were not taxable. At most, goodwill would be an increment to the value of property otherwise taxable, but not a taxable item in and of itself. Significantly, petitioner, in advancing the "taxation" argument, does not enlighten this Court as to how, if at all, the tax assessor has been treating the goodwill value of petitioner's drugstore business in computing petitioner's ad valorem real and personal property tax liability during the years prior to condemnation.

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[2]*Cal. Rev. and Tax. Code* §201 does not expressly designate goodwill, but provides: "All property in this State, not exempt under the laws of the United States or of this State is subject to taxation under this code."

III

The Doctrine of "Fairness" Has Never Been Stretched to Provide for Full Indemnification for All Losses Incidentally or Consequentially Sustained Through Condemnation of Real Property.

The quotation by Petitioner on pages 28-29 of the concluding language of this Court in *Armstrong v. United States* (1960), 364 U.S. 40, 49, must be read in the context of the facts in that case. In *Armstrong,* the Fifth Amendment issue was whether the Government's action in compelling a defaulting shipbuilder to transfer title to uncompleted boats and materials constituted a "taking" of materialmen's liens which had attached against the boats prior to the vesting of title in the Government. This Court held that there was a taking of the liens which entitled the materialmen to just compensation. The rationale of the Court was that the "Government for its own advantage destroyed the value of the liens, something that the Government could do because its property was not subject to suit, but which no private purchaser could have done." (364 U.S. at 48.)

It is respectfully submitted that there is no constitutional compulsion to extend the rationale of *Armstrong* or, indeed, the "disproportionate burden" rationale to petitioner's case. The condemnor's act of "taking" in the case at bench did not extend to an irrevocable, *in rem* appropriation of Mr. Abrams' goodwill. Surely, the Agency in the case at bench cannot be said to have "taken" petitioner's intangible goodwill for its own advantage, as the Government "took" the tangible hulls and materials in *Armstrong.* The reality in the case at bench is that the loss of petitioner's goodwill was due, as the California Supreme Court recognized,

to Mr. Abrams' personal physical inability to transfer his business goodwill to another location. (15 Cal. 3d at 825, 832.)

In eminent domain cases reaching this Court in which similar "fairness" arguments were advanced in support of an expanded rule of compensation, the Court has repeatedly held that the Fifth Amendment does not require, on the actual taking of a property interest, payment for mere expectancies of profit, or for the frustration of contractual rights which pertain to the land, but which are not *specifically taken*. See, *e.g., United States ex rel. T.V.A. v. Powelson* (1943), 319 U.S. 266, 283-284 [loss of a business prospect based on an unexercised power of eminent domain]; *Mitchell v. United States* (1925), 267 U.S. 349 [destruction of condemnee's business resulting from taking of his land for the project and business could not be established elsewhere]; *Omnia Comm'l Co. v. United States* (1923), 261 U.S. 513 [frustration of contractual right resulting from Government requisitioning of steel plate production; *held,* a consequential injury, not a taking]. *Cf. United States v. Fuller* (1973), 409 U.S. 488 [Fifth Amendment does not require the Government to pay for increment of value based on use of condemned lands in conjunction with the Government's lands].

The case at bench is quite similar to *Mitchell v. U.S.* (1925), 267 U.S. 349, 69 L.Ed. 645. In *Mitchell,* the property owner claimed under the Fifth Amendment recovery for his loss of business. The property owner's land was especially adapted to the growing of a particular quality of corn, and the land was taken by the United States through eminent domain. As is the case at bar, the owner in *Mitchell* was unable to

reestablish himself in the same business. Again, as in the case at bar, the Government in *Mitchell* was taking the owner's property for a use totally unrelated to its existing use. The owner's claim for loss of business under the Fifth Amendment was denied on the ground that such business loss was only incidental to the acquisition of the real property and was, therefore, not compensable. *Mitchell v. U.S.* (1924), 217 U.S. 341 at 345.

This is the same rule in California. The California Supreme Court in the *Abrams* decision quoted the rule established in *Oakland v. Pacific Coast Lumber Co.* (1915), 171 Cal. 392 at page 398, 153 Pac. 705, that:

> "It is quite within the power of the legislature to declare that a damage to that form of property known as business or the goodwill of a business shall be compensated for, but unless the constitution or the legislature has so declared, it is the universal rule of construction that an injury or inconvenience to a business is *damnum absque injuria,* and does not form an element of the compensating damages to be awarded."

IV

The California Supreme Court Correctly Applied the Rationale of the Kimball Laundry Decision to the Facts of the Case at Bench.

The California Supreme Court decision summarizes its analysis of the *Kimball Laundry* decision as follows:

> "We learn from the foregoing (*Kimball Laundry* decision) that the rule denying compensation for business goodwill, far from being 'shot through' with exceptions, is uniformly applied in all cases

to which it is applicable—i.e., in all cases wherein the condemnor takes the fee upon which a business is conducted and does not *by the nature of its action* wholly preclude the condemnee from transferring its going-concern or goodwill value to another location. We also learn that this rule is based on the conviction that it is 'fair on the whole' to treat all such condemnees alike, refusing to create distinctions on the basis of 'the remote possibility that the owner will be unable to find a wholly suitable location for the transfer of going-concern value." (*Kimball, supra,* at p. 15; Petition, p. A-26.)

It is respectfully submitted that, contrary to Petitioner's argument at page 30 of his Petition, the *Kimball Laundry* decision and the California Supreme Court decision in *Abrams* deal with both the nature and the effect of the "taking".

With respect to both the nature and effect of the temporary taking of the laundry plant in *Kimball,* this Court held (338 U.S. at 16), "We conclude, therefore, that since the Government for the period of its occupancy of Petitioner's plant has for all practical purposes preempted the trade routes, it must pay compensation for whatever transferable value their temporary use may have had. . . ." In essence, the inevitable effect of the Government's temporary taking in *Kimball* was to appropriate the trade routes. In the case at bench, however, the loss of Petitioner Abrams' goodwill was not the inevitable effect of the Agency's taking. Even with the taking of 20 square blocks for the Redevelopment Project, had Mr. Abrams been a younger man and physically able, he surely could have started a new business elsewhere and perhaps even reestablished

his business in the subject area following redevelopment of a new business district. Mr. Abrams' unfortunate personal age and physical condition merely underscores that his predicament would have been the same, *i.e.,* inability to relocate whether the Agency condemned 20 square blocks or 1 block.

The California Supreme Court correctly stated in the *Abrams* decision:

> "It is clear . . . that damage resulting to business goodwill due to the failure or inability of the *condemnee, in his particular personal circumstances,* to transfer that goodwill to another location, cannot form an element of the compensation required by applicable Constitutional provisions. . . ." (Emphasis added; Petition, pp. A-46-47.)

V

Petitioner's Attack on Relocation Benefits Afforded Under California Government Code Section 7262 Is Based Upon a Misinterpretation of That Code Provision.

California Government Code Section 7262 affords a displaced business operator with a clear election.[3] Section 7262(a)(1) provides for the reimbursement of actual and reasonable moving expenses. Section 7262 (a)(2) provides for payment of the actual direct losses of tangible personal property resulting from the relocation of a business, but not to exceed the cost of moving said tangible personal property. Section 7262 (c), which is a separate and distinct compensation benefit, provides for an "in lieu" fixed relocation payment to a displaced person. Said fixed payment, based

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[3]California Government Code Section 7262 is set forth in its entirety in the Appendix.

on average annual net earnings of the business, may not be less than $2,500 and may be a maximum of $10,000. The "in lieu" payment provided for in Government Code Section 7262(c) is not limited by the costs of moving as contended by Petitioner.

In essence, Petitioner has confused and combined two separate and distinct compensation provisions for displaced business operators. (Petition, Point 3, pp. 25-26.)

Conclusion.

Respondent, The Community Redevelopment Agency of the City of Los Angeles, prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A.

§ 7262. Expenses and Losses for Which Displaced Person Entitled to Compensation.

(a) As a part of the cost of acquisition of real property for a public use, a public entity shall compensate a displaced person for his:

(1) Actual and reasonable expense in moving himself, family, business, or farm operation, including moving personal property.

(2) Actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the public entity.

(3) Actual and reasonable expenses in searching for a replacement business or farm.

(b) Any displaced person who moves from a dwelling who elects to accept payments authorized by this subdivision in lieu of the payments authorized by subdivision (a) shall receive a moving expense allowance, determined according to a schedule established by the public entity, not to exceed three hundred dollars ($300), and in addition a dislocation allowance of two hundred dollars ($200).

(c) Any displaced person who moves or discontinues his business or farm operation who elects to accept the payment authorized by this subdivision in lieu of the payment authorized by subdivision (a), shall receive a fixed relocation payment in an amount equal to the average annual net earnings of the business or farm operation, except that such payment shall

not be less than two thousand five hundred dollars ($2,500) nor more than ten thousand dollars ($10,000). In the case of a business, no payment shall be made under this subdivision, unless the public entity is satisfied that the business cannot be relocated without a substantial loss of patronage and is not a part of a commercial enterprise having at least one other establishment not being acquired, which is engaged in the same or similar business. For purposes of this subdivision, the term "average annual net earnings" means one-half of any net earnings of the business, or farm operation, before federal, state, and local income taxes, during the two taxable years immediately preceding the taxable year in which such business or farm operation moves from the real property being acquired, or during such other period as the public entity determines to be more equitable for establishing such earnings, and includes any compensation paid by the business or farm operation to the owner, his spouse, or his dependents during such two-year or such other period. To be eligible for the payment authorized by this subdivision, the business or farm operation shall make available its state income tax records, and its financial statements and accounting records, for audit for confidential use to determine the payment authorized by this subdivision. In the case of an outdoor advertising display, the payment shall be limited to the amount necessary to physically move or replace such display.

(d) Whenever the acquisition of real property used for a business or farm operation causes the person conducting the business or farm operation to move from other real property, or to move his personal property from other real property, such person shall receive payments for moving and related expenses under

subdivision (a) or (b) and relocation advisory assistance under Section 7261 for moving from such other property.

(e) Whenever a public entity must pay the cost of moving a displaced person under paragraph 1 of subdivision (a), or subdivision (d) of this section:

(1) The costs of such move shall be exempt from regulation by the Public Utilities Commission.

(2) The public entity may solicit competitive bids from qualified bidders for performance of the work. Bids submitted in response to such solicitations shall be exempt from regulation by the Public Utilities Commission.